

FEDERAL RULES OF CIVIL AND APPELLATE PROCEDURE – 2005

Outline of Subjects to be Covered

Emphasis will be on the practical application of the Federal Rules of Civil Procedure to practice in the federal court. Treatment of the Federal Rules of Appellate Procedure will be limited to the taking of an appeal in a civil case and a brief summary of the procedure for prosecuting an appeal.

SUMMARY OF THE RULES OF CIVIL PROCEDURE

- I. Service of Process
- II. Pleadings and Motions
- III. Pretrial Conference and Order
- IV. Parties
- V. Discovery
- VI. Trial
- VII. Judgments
- VIII. Injunctions and Other Special Remedies
- IX. Open Court Trials; Other Hearings in Chambers
- X. General Provisions

DETAILED OUTLINE OF THE RULES OF CIVIL PROCEDURE

[Parenthetical references to numbers are to the Federal Rules of Civil Procedure.]

- I. Service of Process
 - A. Commencement of Action (3) – By filing complaint, not service of summons.
 - B. Summons (4)
 - 1. Issued and signed by clerk, not lawyer.

2. Service by non-party, 18 and over.
3. Waiver of Service – defendant who refuses to waive risks paying costs and attorneys fees; Practice tip: waiver extends time to answer and eliminates only challenge to sufficiency of summons or service of process; no waiver of venue or jurisdiction of court over person.
4. Territorial limits – state long arm, "100 mile bulge"; beyond if authorized by federal law.
5. Proof of service made to Court – amendments to proof of service at any time if okay by Court.
6. Time limit for service – 120 days after filing, with extension for good cause.
7. Service in foreign country by Hague Convention, letters rogatory or other methods.
8. Service on the United States or its agency or officer.

C. Serving and Filing of Pleadings, Discovery, and Other Court Papers (5)

1. Rule governs service after parties joined in action; all parties served, except defaulted parties, who are served only with pleadings asserting new claims.
2. How made: upon attorney or unrepresented party by mail, by hand, or electronically with consent; for actions against seized property upon the person in possession of the property.
3. Service complete on mailing.
4. Discovery served, but not filed.
5. Filing with Court – Practice tip: get a date stamped copy.
6. Electronic or fax filing permitted if allowed by local rule.
7. Clerk cannot refuse to file if form improper.

D. Time Computation (6)

1. Date when period begins not counted; last day included unless it is weekend or holiday; if period less than 11 days, weekends and holiday not counted. Practice tip: do not delegate the calculation of time!
2. Motions to enlarge – procedure differs if request made before the original period expires.
3. Service by mail – three (3) days added

II. Pleadings and Motions

- A. "Pleadings" and "motions" distinguished and defined; motions in writing except if made during hearing or trial (7)
- B. Disclosure statement required for nongovernmental corporations (7.1)
- C. General Pleadings Rules (8)

1. Claims short and plain – no technical forms of pleading required.
2. Defenses - admit, deny, or assert lack of knowledge or information; specific vs. general denial.
3. Mandatory affirmative defenses listed.
4. Failure to deny deemed admission if response required.
5. Alternative or hypothetical claims and defenses permitted.

D. Pleading Special Matters (9)

1. Capacity not averred unless required to show jurisdiction; issue of capacity raised by specific negative averment.
2. Fraud, mistake, and state of mind stated with particularity; malice, intent, and knowledge averred generally.
3. Special pleading rules for conditions precedent, official document or act, judgment and time and place.
4. Special damage must be specifically stated; Practice tip: punitive damages are special damages.
5. Admiralty and maritime claims must be identified.

E. Form of Pleadings (10)

1. Caption of Complaint names all parties; subsequent pleadings, motion and discovery headed with caption naming first named party; Practice tip: use "et al." to refer to the rest of the parties.
2. Separate numbered paragraphs.
3. Adoption by reference and exhibits.

F. Signing of Pleadings (11)

1. Signed by attorney of record or party; Practice tip: use a blue pen.
2. Certification to Court of inquiry reasonable under the circumstances.
3. Sanctions on attorney, law firm and/or party.
4. Rule 11 does not apply to disclosures, motions, requests, objections and responses subject to Rules 26 – 37 (discovery).
5. Practice issue: signature on behalf of another attorney with consent.

G. Presenting Defenses (12)

1. Answer, motion or other responsive pleading – timing: 20 days or 60 days with waiver of process or US as defendant.
2. Extensions by stipulation of the parties or motion to Court; Practice tip: extend time to "answer, move, or otherwise respond." Note Local Rules 22-23.
3. Motions and consolidation of motions; Practice tip: if motion to dismiss is filed, all Rule 12 defenses and objections must be asserted in that motion.

4. Some motions waived unless asserted.
5. Subject matter jurisdiction may be raised at any time; Practice tip: do not rely on consent of other party to possible problem with subject matter jurisdiction.

H. Counterclaims and Cross-claims (13)

1. Compulsory – arises out of same transaction or occurrence.
2. Permissive – any other claim.
3. Omitted and supplemental counterclaims.
4. Counterclaims may not diminish recovery sought by plaintiff, but may claim relief that exceeds or is different from relief sought by plaintiff.
5. Cross-claims against co-party.

I. Third Party Practice (14)

1. Any party against whom a claim is asserted may bring in a 3d party who may be liable.

J. Amended and Supplemental Pleadings (15)

1. Relation back doctrine – if permitted by applicable statute of limitations, claim arises out of same transaction or occurrence, or party to be added had notice and not prejudiced.
2. Supplemental pleadings.

III. Pretrial Conference and Order (16) [Amendment Pending]

1. Pretrial conferences – objectives and subjects for consideration.
2. Scheduling order that sets timing for discovery, motion and trial; Practice tip: remember duty to confer imposed by Rule 26(f) before scheduling conference or order.
3. Final pretrial conference to make plan for trial.
4. Sanctions.

IV. Parties

A. Capacity (17)

1. Real party in interest.
2. Law of individual's domicile and corporation's organization used to determine capacity.
3. Infants and incompetents – representative or guardian as litem.

B. Joinder of Claims and Remedies, including claim to set aside fraudulent conveyances. (18)

- C. Joinder of Persons (19)
- D. Indispensable Parties
 - 1. Permissive joinder (20)
 - 2. Misjoinders (21)
- E. Interpleader (22)
 - 1. Persons with claims against plaintiff joined and required to interplead if plaintiff exposed to multiple liability.
 - 2. Plaintiff may aver not liable in whole or part to any or all claimants.
- F. Class Actions (23)
 - 1. Prerequisites – numerosity, commonality, typicality, and adequacy.
 - 2. Maintenance permitted if (1) risk of inconsistent adjudications; (2) action generally applicable to class in case seeking injunction or declaratory relief; or (3) questions of law and fact predominate.
 - 3. Procedure
 - 4. Dismissal or compromise only after notice, fairness hearing and court approval.
 - 5. Discretionary right of appeal
 - 6. Class counsel appointed by court once class certified.
- G. Derivative Actions by Shareholders (23.1)
- H. Unincorporated Associations (23.2)
- I. Intervention (34)
 - 1. As of right if permitted by statute or applicant has an interest in property that would be impaired if case proceeds without him.
 - 2. Permissive if permitted by statute or applicant has a claim with a question of law or fact in common with main action. In exercise of discretion, court to consider prejudice to original parties.
 - 3. Procedure
- J. Substitution of Parties (25)
 - 1. Death.
 - 2. Incompetence.
 - 3. Transfer of interest.
 - 4. Public officers – change.

V. Discovery

A. General Provisions and Duty to Disclose (26) [*Amendment Pending*]

1. Automatic initial disclosures – made 14 days after 26(f) conference of parties (26(a)(1)); Practice tip: parties can alter or eliminate this disclosure by agreement at the 26(f) conference.
2. Automatic pretrial disclosures of witnesses and exhibits – made at time directed by court or 30 days before trial; Practice tip: this is the only automatic disclosure that must be filed (26(a)(3)).
3. Scope of discovery (26 (b)).
4. Work Product discoverable only on showing of substantial need and undue hardship, except attorney impressions and conclusions protected (26(b)(3)).
5. Timing and sequence – no discovery until after 26(f) conference, but then no specific sequence (26(d)).
6. Duty to confer – 26(f) conference 21 days before Rule 16 scheduling conference or order; report to court on discovery plan 14 days after conference.
7. Signing of disclosures and discovery (26(g)).
8. Duty to supplement disclosures or responses (26(e)).
9. Experts
 - a. Automatic expert disclosure and written expert report for testifying experts (26(a)(2)) made at time directed by court or 90 days before trial
 - b. Depositions, discovery of testifying experts (26(b)(4)).
10. Protective Orders (26(c))
11. Privilege (26(b)(5))

E. Stipulations – written agreements can change procedures and limits on discovery as long as no impact on time set for completion of discovery, hearings or trial (29).

F. Depositions (27-28, 30-32)

1. Before action or pending appeal (27) – verified petition.
2. Person before whom depositions may be taken (28).
3. Depositions taken anytime after 26(f) conference without leave of court except prisoners or more than 10 depositions (30(a)).
4. Notice procedures (30); consequences of less than 11 days notice 32(a)(3)); errors in notice waived unless written notice given promptly (32(d)(1)).
5. Designation of knowledgeable person (30(b)(6)).
6. Non-stenographic and video depositions may be taken if stated in the notice (30(b)).

7. Method of questioning – examination and cross-examination as permitted at trial (30(c)).
 8. Schedule and duration limited to one day of 7 hours (30(d)(2)).
 9. Objections concise, non-argumentative and non-suggestive; instructions not to answer limited to privilege, enforce court order, or to make a motion (30(d)(1)).
 10. Suspension and termination of a deposition to protect witness (30(d)(4)).
 11. Right of witness to have 30 days to read and sign (30(e)); waiver.
 12. Certification
 13. Failure of attorney to attend or serve subpoena (30(g)).
- G. Written questions depositions (31)
- H. Use in court
1. Depositions may be used at trial or hearing so far as admissible under rules of evidence against any party present or represented (32(a)).
 2. Substitution of party under Rule 25 does not affect right to use (3(a)(4)).
 3. Objections to competency, relevancy or materiality not waived by failure to make them during deposition unless the ground is one that could have been obviated or removed if presented at the time. (32(d)(3)(A)).
 4. Errors in the form of the questions, the manner of taking the deposition, or in the oath or conduct of the parties are waived unless objection made at the deposition (30(d)(3)(B)).
- I. Interrogatories (33) [*Amendment Pending*]
1. Procedure and limit to 25 written questions; limited to parties; questions may ask about opinions, contentions or application of law to fact.
 2. Objections and responses due in 30 days; Practice tip: serve objections even if more time to be sought for answers.
 3. Use of answers at trial
 4. Business records production may be made at option of party responding if answer may be derived from records and burden the same.
- J. Document Production and Land Entry (34) [*Amendment Pending*]
1. Procedure; limited to parties.
 2. Response within 30 days whether inspection permitted or objection.
 3. Production may be made in order of request or as kept in ordinary course of business.
 4. Contrast with non-party discovery (45).
- K. Physical and Mental Examinations (35)
- L. Requests for Admission (36)

M. Sanctions (37) [*Amendment Pending*]

1. Motions to compel
2. Duty to confer and certify before seeking court action.
3. Failure to comply with court orders
4. Failure to respond to discovery

VI. Trials

A. Jury Trial (38)

1. Demand as to any issues by any party within 10 days of last pleading; may not be withdrawn except with consent of all parties.
2. Jury waived unless timely demand served and filed in court.

B. Court vs. jury (39)

C. Assignment (40)

D. Dismissal of Actions (41)

1. Voluntary by plaintiff before answer or motion for summary judgment and voluntary by stipulation at any time – without prejudice, unless plaintiff agrees that dismissal is with prejudice.
2. Involuntary is adjudication on merits unless for lack of jurisdiction, improper venue or failure to join a party.

E. Consolidation, severance, bifurcation (42)

F. Taking Testimony (43)

G. Proof of Official Record (44)

H. Determining Foreign Law (44.1)

I. Subpoenas (45) [*Amendment Pending*]

1. Subpoenas compel testimony (*ad testificandum*) and production of documents (*duces tecum*) from parties and non-parties for hearings, depositions and trial.
2. Form and service; if subpoena for deposition, issued by court in district where deposition will proceed; otherwise issued by court presiding over hearing or trial.
3. Rule 45 cannot circumvent procedure of Rule 34 for parties.

4. Protection of persons subject to subpoenas obtained by timely motion to quash or modify.
 5. Compliance with subpoena to permit inspection and copying of documents not required if objection served 14 days after subpoena unless and to the extent that court orders compliance.
- J. Objections and Stating Grounds (46)
- K. Jurors (47)
1. Voir dire by judge or attorney.
 2. Challenges – peremptory [3 – 28 U.S.C. §1870] and for cause.
- L. Number of jurors (6 to 12) and unanimity (48)
- M. Special Verdicts and interrogatories (49)
- N. Judgment as a Matter of Law (50) *[Amendment Pending]*
1. JMOLs may be made at any time during trial after a party has been heard on an issue and before submission of case to jury.
 2. JMOLs may be renewed by filing a motion 10 days after entry of judgment.
 3. Renewed JMOL may be accompanied by motion in alternative for a new trial.
 4. Conditional ruling on motion for new trial if renewed JMOL granted.
 5. If JMOL granted and judgment entered, motion for new trial filed within 10 days after entry (see Rule 59).
- O. Jury Instructions (51)
1. Written requests for instructions.
 2. Charging conference; objections on the record, stated distinctly the matter objected to and grounds for objection.
- P. Findings by Court (52)
- Q. Masters (53)
- VII. Judgments
- A. Form of Judgment (54)
1. Defined as any decree or order from which an appeal lies.
 2. Multiple claims and parties
 3. Demand for judgment.

- 4. Costs to the prevailing party.
- B. Default (55)
 - 1. By the Clerk.
 - 2. By the Court.
 - 3. Setting aside default.
- C. Summary Judgment (56)
- D. Declaratory Judgments (57)
- E. Entry of Judgment (58)
- F. New Trials and Amending Judgments (59)
- G. Relief from Judgments (60)
- H. Harmless Error Rule (61)
- I. Stay of Judgment (62)
- J. Judicial Disability (63)

VIII. Injunctions and Special Remedies

- A. Seizure of Person or Property (64)
- B. Injunctions (65)
 - 1. Temporary restraining order
 - 2. Preliminary injunction
- C. Sureties (65.1)
- D. Receivers (66)
- E. Deposits (67)
- F. Offer of Judgment (68)
- G. Execution (69)
- H. Judgment for Specific Acts (70)
- I. Condemnation (71A)

- J. Magistrate Judges (72-73)
 - 1. Nondispositive matters.
 - 2. Dispositive motions.
 - 3. Trial by consent.
- IX. Open Court Trials; Other Hearings in Chambers (77)
 - A. Actions by Clerk (77(c)).
 - B. Notice of Orders (77(d)).
 - C. Motions Days (78).
 - D. Records Kept by Clerks (79).
- X. General Provisions
 - A. Local Rules (83)

SUMMARY OF THE RULES OF APPELLATE PROCEDURE

- I. When is a Judgment or Order of a District Court Appealable?
- II. Procedure for Taking an Appeal
- III. The Record and Docketing the Appeal
- IV. Briefs and Oral Argument

DETAILED OUTLINE OF THE RULES OF APPELLATE PROCEDURE

[Except as otherwise noted, parenthetical references to numbers are to the Federal Rules of Appellate Procedure.]

- I. When is a Judgment or Order of a District Court Appealable?
 - A. Final and partial final decisions (28 U.S.C. § 1291; Fed. R. Civ. Pro. 54(b))
 - B. Permitted and discretionary interlocutory appeals (28 U.S.C. § 1292)
 - C. Orders granting or denying class certification (Fed. R. Civ. Pro. 23 (f))

II. Procedure for Taking an Appeal

- A. Appeal as of right – contents of notice of appeal (3)
- B. Notice of appeal filed in District Court (3)
- C. Timing of appeal – unless U.S. is a party, 30 days after judgment or order entered (4); alternative rule for multiple appeals -- 14 days after 1st notice (4(a)(3))
- D. Permissive appeal – petition for leave to appeal (5)
- E. Stay or injunction pending appeal (8)

III. The Record and Docketing the Appeal

- A. Composition of the record (10)
- B. Appellant's duty to order transcript (10 (b) (1))
- C. Forwarding the record from the district court to the court of appeals (11)
- D. Docketing of appeal and filing of record (12); date of filing of record provided to parties (12(c))

IV. Briefs and Oral Argument

- A. Filing and service of motion and briefs (25)
- B. Computation of time (26)
- C. Corporate disclosure statement (26.1)
- D. Contents and format of Appellant's, Appellee's and Reply Briefs (28)
- E. Amicus Curiae brief (29)
- F. Appendix to briefs (30)
- G. Service and filing of briefs – 40 days after the record is filed (31)
- H. Form of briefs, including length limits (32)
- I. Oral argument (34)
- J. Hearing or rehearing en banc (35)

